entered against tne first defendant. In the course of the hearing it was apparent that the plaintiff would have wanted judgment against the second defendant as well on the basis of contributory negligence. Having regard to the facts, particularly that which had been admitted by the first defendant, I do not think it was open to me to conclude that the driver of the motor lorry was to share the blame for the accident."

The main question raised in this appeal is whether the learned trial judge was right to treat the first defendant's plea of guilty as an admission of such a nature as to preclude the court from entertaining a case of contributory negligence against the other defendant.

I note that oral judgment was given the day after the trial. Reading the judgment itself it is clear that the judge had taken time to consider not only the authorities cited to him but also the facts. Perhaps, with respect, the phrase he used, "not open to me etc.," could have been more happily worded. Nevertheless, in the same sentence and in the context of the judgment as a whole, due regard had been given to the facts in evidence. The first defendant had had every opportunity to explain his previous unqualified admission of liability. He did not seek to lay the blame, or a part of it elsewhere. The judge, in my opinion, quite rightly took this fact into account: see *Hollington* v. *Hewthorne* [1] and *Ingram* v. *Ingram.*[2] For my own part, I think it is sufficient to say that, where the evidence on both sides was so evenly balanced that the judge had to look for evidence elsewhere to decide the issue, it is abundantly clear that the appellant had failed to discharge the onus of proof which rested on him as plaintiff: see *Robins* v. *National Co. Ltd. & Ors.*[3] Were I to try the case myself I should have come to the same conclusion.

I would accordingly dismiss the appeal with costs.

Barakbah L.P. and **Azmi C.J. (Malaya)** concurred.

Appeal dismissed.

Solicitors: *Murphy & Dunbar; Laycock & Ong.*

LEE CHIANG SENG & 9 ORS. v. PUBLIC PROSECUTOR

[A.Cr.J. (Winslow J.) March 8, 1967]

[Singapore — Magistrates' Appeals Nos. 157 - 164, 196 and 218 of 1967]

Road Traffic — Use of vehicle as public service vehicle without being licensed as such — Forfeiture — Need for strict proof of seizure — Road Traffic Ordinance, 1961, s. 50 — Road Traffic (Amendment) Act, 1966.

Criminal Law and Procedure — Charge — Defect in — Mistake as to form only.

There are three prerequisites that must be satisfied before an order of forfeiture can be made under section 50 of the Road Traffic Ordinance, 1961, namely (a) the vehicle had been used in the commission of an offence under section 50(1); (b) the said vehicle had been seized under section 50(4), and (c) the Public Prosecutor had made a written application for forfeiture. Where Parliament has given powers of seizure to the executive to be followed by forfeiture on the written application of the Attorney-General (and even an innocent third party who may own the car has no remedy and the courts are deprived of any power to exercise any discretion in the matter of forfeiture) the three prerequisites to such an order should be strictly proved and if the court is left in doubt as to what took place no such order should be made.

In this case the charge followed the following lines:

"That you, at or about . . . on . . . at . . . used motor car . . . as a public service vehicle when it (*sic*) was not in force in respect of such vehicle a public service vehicle licence and thereby committed an offence under section 50(1) punishable under section 59(2) of the Road Traffic (Amendment) Act, 1966."

Held: the ingredients of the particular offence required to be proved under section 50 of the Road Traffic Ordinance, 1961 have been clearly set out and any mistake in referring to section 50 of the Road Traffic Ordinance, 1961 as section 50 of the Road Traffic (Amendment) Act, 1966 was not so defective as to vitiate a conviction under that section on that ground alone because it was a mistake as to a matter of form only.

Cases referred to:—

(1) *R.* v. *Koomah* (1874), 3 Ky. 66.

(2) *Powell* v. *Kempton Park Racecourse Co. Ltd.* [1899] A.C. 143, at p. 160.

(3) *Deputy Public Prosecutor* v. *Tan Ah Guat* [1947] M.L.J. 32.

(4) *Tai Theong & Anor.* v. *R.* [1947] M.L.J. 11.

(5) *R.* v. *Ong Suan* [1933] M.L.J. 17.

MAGISTRATE'S APPEAL.

Dato' David Marshall for the appellants.

N. Ganesan for the respondent.

Winslow J.: The first 9 appeals listed above in which the appellants had pleaded guilty to using the respective motor vehicles driven by them on 15th July, 1966, in effect, as taxis, without their being licensed as such, were argued before me on 8th February, 1967.

Mr. Marshall, counsel for the appellants, sought and obtained permission to argue and to add grounds of appeal against the validity of the convictions as well which had been challenged in the original notices of appeal filed by the appellants but had not been included in the subsequent grounds of appeal. The deputy public prosecutor, Mr. Ganesan, raised no objections provided he was given an opportunity of an adjournment should the occasion arise and at the close of Mr. Marshall's submissions he renewed his application which I granted.

The same 9 appeals came on for continued hearing on 3rd March, 1967 when the 10th appeal listed above was added as it involved similar facts and similar grounds of appeal. The main difference between the 10th appeal and the preceding 9 lies in the fact that the 10th

appellant had not pleaded guilty but had claimed trial and had been tried and convicted.

In all the 10 cases the magistrates concerned made orders of forfeiture of the vehicles concerned. It should be noted that the grounds in the first 9 appeals, as originally filed, were wholly against the aforesaid forfeiture. The 10th appeal contained grounds against both.

The charge on which each of the appellants was tried, except the appellant in No. 196 (in respect of whom no complaint was made), followed the following lines:—

"That you, at or about . . . on . . . at . . . used motor car . . . as a public service vehicle when it (*sic*) was not in force in respect of such vehicle a public service vehicle licence and thereby committed an offence under section 50(1) punishable under section 50(2) of Road Traffic (Amendment) Act, 1966."

It was argued that this charge did not disclose any offence known to the law. It seems to me that there is no merit in this contention. The ingredients of the particular offence required to be proved under section 50 of the Road Traffic Ordinance, 1961 have been clearly set out and I do not think that any mistake in referring to section 50 of the Road Traffic Ordinance, 1961 as section 50 of the Road Traffic (Amendment) Act, 1966 is so defective as to vitiate a conviction thereunder on this ground alone.

In *R.* v. *Koomah* [1] it was held that the mistake was only as to a matter of form and the court amended the conviction by striking out the incorrect citation and inserting the proper one.

It was further argued that before a private motor car could be said to be used as a public service vehicle it should be shown that such use was deliberate, designed and repeated and that there should be an element of continuity in such use. It was submitted that use should be proved to have been made on more than one occasion. With this submission I am unable to concur.

As Earl of Halsbury L.C. said in *Powell* v. *The Kempton Park Racecourse Co., Ltd.*:—[2]

"It is not the repeated and designed, as distinguished from the casual or infrequent, use which the employment of that word imports here, but the character of the use as a use by some person having the dominion and control over . . .".

It is not in dispute that the appellants in these cases had dominion and control over the vehicles in question at the relevant times. On the facts admitted by the appellants in the first 9 appeals there could be little doubt as to the character of the use made by them of the motor vehicles in question. Further, the proviso to section 50(2) which reads as follows:—

"Provided that a person shall not be convicted of an offence under this section if he proves to the satisfaction of the court that he used the motor vehicle, the subject of the charge, as a public service vehicle in an emergency for the purpose of conveying a sick or injured person to hospital or to bring medical aid to such person or for the purpose of making a report to a police station and that he had made all reasonable efforts to hire a public service vehicle for the purpose of the journey."

makes it clear that the subsection in question clearly contemplates use on a single occasion e.g. during an emergency.

In the case of the first 9 appellants who had pleaded guilty to the charge it was contended that, being illiterate and unrepresented, they were misled as to the nature and consequences of their pleas. In my opinion they could not have been so misled judging by the facts which they admitted and what they said in mitigation. In the particular cases of appellants in Nos. 157, 158, 159, 160, 161 and 196 it was contended that the trial magistrate has misled them by explaining to them that on conviction and on a written application for forfeiture of their vehicles in question by the public prosecutor the court might then make an order of forfeiture. It was contended by Mr. Marshall that, in those circumstances, the court should have explained to them that it was bound to make an order of forfeiture. But Mr. Marshall, in dealing with the question of the actual forfeiture of the vehicles in question, also contended that it was a prerequisite to an order of forfeiture that the vehicles in question should be proved to have been seized under the provisions of subsection (4) of section 50. In the circumstances I do not think that the magistrate was entirely wrong in saying that the court might make an order of forfeiture after their conviction on receiving a written application from the public prosecutor, because in the absence of evidence of seizure the magistrate would have had no power to order forfeiture. Evidence of seizure however is not a prerequisite to a conviction. In any case, there seems to be no doubt that the appellants intended to admit their guilt without any qualification whatsoever and I cannot say that their pleas were wrongly accepted.

The convictions recorded in respect of all the 9 appellants who pleaded guilty and who were convicted accordingly are therefore upheld.

With regard to No. 218 there was, in my opinion, ample evidence to sustain a conviction.

I now turn to the question of the order of forfeiture made in each case.

As I have already indicated earlier there are 3 prerequisites to such an order —

(1) That the vehicle has been used in the commission of an offence under section 50(1).

(2) That the said vehicle has been seized under the provisions of section 50(4).

(3) That the public prosecutor has made a written application for forfeiture.

The only prerequisite with which I need concern myself now relates to whether the vehicles in question were seized under the provisions of section 50(4) of the Road Traffic Ordinance, 1961. I was referred to the following passage from Brown J.'s judgment in *Deputy Public Prosecutor* v. *Tan Ah Guat*:—[3]

"Further, there is no evidence (as there ought to have been) that the vehicle had been seized, and before an order for forfeiture can be made there must in my opinion be express evidence to this effect."

An examination of the record of that appeal shows clearly that the motor car in question had been stopped by the police at a road-block in Thomson Road and on a search of the vehicle dutiable liquor was found therein. There was no evidence that the vehicle was ever taken into police custody or detained by them. The vehicle was neither taken to a police station nor directed to a police station by the officers concerned and there is nothing to indicate that at the time of the trial the vehicle was in police custody. In fact it was stated from the Bar during the argument on appeal that the vehicle was not then under detention.

In a subsequent case, *Tai Theong & Anor.* v. *R.*[4] Brown J. appears to have come to a different conclusion on the facts where the evidence of seizure was as follows:—

"When I found the gunny sack I asked the first accused and the second accused to accompany us to the Customs House in the taxi. We brought Exhibits G and H (dutiable liquor) with us."

It is clear from this that the Revenue Officers seized the taxi. There was also evidence at the trial that the magistrate made a personal inspection of the vehicle concerned in circumstances showing that the vehicle was under detention by the Revenue authorities. There was ample evidence on which Brown J. could conclude that the vehicle had been properly seized.

It will be seen therefore that the three pre-conditions set out earlier will have to be satisfied by strict proof before an order of forfeiture can be made. Where a conviction has been recorded either on a plea of guilty or otherwise there will be clear evidence of the use of the vehicle concerned in the commission of the offence under section 50 but, since evidence of seizure is not an essential ingredient in proving the offence, it may sometimes happen that after conviction the magistrate is left with no evidence on this point. It is therefore incumbent on the prosecution to prove seizure, unless that has already been done. I do not think that a bare statement by the prosecution that the car has been seized will suffice. Nor does a statement to this effect in the preamble to the Attorney-General's written application for forfeiture in my opinion dispense with proof of seizure. Powers of seizure may be exercised under section 50(4) by police officers and other persons mentioned therein on discovery by them that an offence under section 50 has been committed in respect of the vehicle concerned and such persons should give the required evidence.

The difficulty encountered in *Deputy Public Prosecutor* v. *Tan Ah Guat, supra,* could have been obviated if there had been evidence that the vehicle had been removed by the police and detained at a police station after it had been stopped at the road-block. In *Tai Theong & Anor.* v. *R.* there was such evidence.

Of the 10 appeals before me eight appear to satisfy this test. In the other two there is no evidence of seizure as such. The appellants were told by the police in those two cases to proceed to Maxwell Road police station. Whether they arrived there on foot or by helicopter or in their respective cars no one knows. I do not think that the magistrate was entitled to assume that the cars were driven there by the appellants and detained by the police. He should therefore have called for evidence of this before making the orders of forfeiture in question.

Where Parliament has given powers of seizure to the executive to be followed by forfeiture on the written application of the Attorney-General even an innocent third party who may own the car has no remedy and the courts are deprived of any power to exercise any discretion in the matter of forfeiture. (See *R.* v. *Ong Suan* [5]). It therefore seems only just that the three prerequisites to such an order should be strictly proved and if the court is left in doubt as to what took place no such order should be made.

In the case of the two appeals where the appellants were asked to proceed to Maxwell Road police station the court can only make a conjecture as to whether their cars were seized or not after that.

If there is an ambiguity about the facts the prosecution will only have themselves to blame.

I shall now proceed to examine the record of the 10 appeals before me as to evidence of seizure which varies from case to case as follows:—

No. 157 — The police drove the car in question with the accused inside to Maxwell Road police station. In my opinion the facts here are similar to those in the case of *Tai Theong* v. *R., supra.*

No. 158 — The police instructed the appellant to proceed to Maxwell Road police station. I am not so sure that this is sufficient to establish seizure of the vehicle driven by this appellant. As I have said, the appellant could have proceeded to Maxwell Road police station without his car and there is nothing to indicate that the vehicle was detained in any police station.

No. 159 — The police took the car to Maxwell Road police station after the appellant had run away. This was, in my opinion, adequate evidence of seizure.

No. 160 — The car and the appellant were brought to Maxwell Road police station. This also seems satisfactory evidence of seizure. Similarly, in Nos. 161, 162, 163, 164 and 196.

No. 218 — The appellant had claimed trial. The only evidence relating to seizure is as follows:—

Corporal 2535 of the Traffic Police gave evidence to the effect that after he had discovered the commission of an offence by the appellant he asked him to proceed to Maxwell Road police station.

The facts here are, in my opinion, similar to the facts in No. 158. There is nothing to indicate what happened to the car and the appellant could have arrived at the police station without it.

In Nos. 158 and 218 therefore, I am of the opinion that the orders of forfeiture should be set aside. In all the other appeals the orders are confirmed.

I might add that the convictions in all cases, except No. 196, will be in respect of offences as charged, with the substitution of the words "Road Traffic Ordinance, 1961" for the words "Road Traffic (Amendment) Act, 1966". Subject to this, the appeals against convictions in all the appeals are dismissed. So are all the appeals against orders of forfeiture except in Nos. 158 and 218 where I set aside the orders made.

All appeals against convictions dismissed. Appeals against order of forfeiture, except in appeals Nos. 158 & 218, dismissed.

PACIFIC TIN CONSOLIDATED CORPORATION v. HOON WEE THIM

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and Ong Hock Thye F.J.) March 9, 1967]

[K.L. — Federal Court Civil Appeal No. X.38 of 1966]

Tort — Rule in Rylands v. Fletcher — Onus of proof on the pleadings — Opinion of experts — Grounds of opinion to be inquired into — Res ipsa loquitur — Negligence — Foreseeability — Standard of care — Whether construction of ponds above ground level in mining operations was natural or non-natural user of land.

Mining — Duty of neighbours — Natural user of land.

Evidence — Expert opinion — Based on reports of facts — Proof.

The appellants, for the purpose of their dredge-mining operations, maintained on their lands large ponds separated from each other by intermediate bunds. By means of spillways the flow of water from one pond to another was regulated and the water-level of each pond maintained as desired. The lands being situated in an inclined valley, with a drop of some 60 feet, step ponds had to be constructed well above ground level. A large breach in the bund between two large ponds (which together held nearly 500,000,000 gallons of water) caused such a violent outflow from the higher pond to the other on the lower level, that the combined volume of water broke through the perimeter bund, causing extensive damage to life and property in the low-lying lands adjacent to the ponds.

In an action for damages the respondent rested his claim on two grounds, negligence and the rule in *Rylands* v. *Fletcher*.(1)

The fundamental issue was: what caused the breach in the bund? It was the appellants' case that this was due to the irruption of a subterranean spring through the bedrock, which, if true, was clearly unforeseeable and an Act of God.

Upon Gill J. ([1966] 2 M.L.J. 240) holding against respondent on the issue of negligence and against the appellant on the application of *Rylands* v. *Fletcher*,(1) the parties cross-appealed against such decision.

Held: according to the pleadings, it lay on the appellants to prove affirmatively that it was a spring from an artesian source which caused the collapse of the bund, and this onus had not been discharged;

(2) where the opinion of experts is based on reports of facts, those facts, unless within the experts' own knowledge, must be proved independently; that the conclusions, of the experts were, on their own admissions, based on false premises and ought to be rejected;

(3) the breach in the bund was due to defects in the construction or the material used or both: *res ipsa loquitur;*

(4) the common law duty of care owed by the mining company to its neighbours is as stated by Lord Atkin in *Donoghue* v. *Stevenson;* (2)

(5) the magnitude of the damage, if it ever arose, was foreseeable or ought to have been foreseen and no risks should have been taken of the bund giving way from any foreseeable or preventable cause; the degree of care taken must be commensurate with the risk;

(6) natural user of their property does not imply that miners had *carte blanche* to carry on mining operations in any manner they think fit, however hazardous to their neighbours; that the use to which the sand bund was put in this case was a non-natural user; and the rule in *Rylands* v. *Fletcher* accordingly applied.

Cases referred to:—

(1) *Rylands* v. *Fletcher* (1865-6), L.R. 1 Ex. 265; 19 L.T. 221.

(2) *Donoghue* v. *Stevenson* [1932] A.C. 562, 580.

(3) *The Wagon Mound (No. 2)* [1966] 3 W.L.R. 498, 512.

(4) *The Wagon Mound (No. 1)* [1961] A.C. 388.

(5) *Bolton* v. *Stone* [1951] A.C. 850.

FEDERAL COURT.

P. Mooney (*J. Puthucheary* with him) for the appellants.

Denis Murphy and *T. G. Dunbar* for the respondent.

Cur. Adv. Vult.

Ong Hock Thye F.J.: This is an appeal against the judgment of Gill J. holding the appellants liable for damages under the rule in *Rylands* v. *Fletcher*.(1)

It has fallen on me to lead off with this judgment, although I should have preferred to inform myself first of the judgments of my abler, learned colleagues. I shall, therefore, concentrate mainly on the questions of fact